LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 17 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 778

UNITED STATES OF AMERICA *ex rel.* EDGAR I. SHOTT, JR.,
Petitioner

v.

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

THURMAN ARNOLD
JAMES F. FITZPATRICK
Counsel for Petitioner

Of Counsel:

ARNOLD & PORTER
1229-19th Street, N. W.
Washington, D. C. 20036

November 17, 1966

PRINTED BY BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

BLANK

PAGE

TABLE OF CONTENTS

	Page
Prior Proceedings and Jurisdiction of This Court	1
Question Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Petition	9
Conclusion	17
Appendix A	19
Appendix B	33

TABLE OF CITATIONS

Cases:

Adams v. *New York*, 192 U.S. 585 (1904)	11
Casey v. *United States*, 276 U.S. 413 (1928)	11
Catterlin v. *State*, 292 U.S. 614 (1934)	16
Griffin v. *California*, 380 U.S. 609 (1965)	2
Hawes v. *Georgia*, 258 U.S. 1 (1922)	11
Morrison v. *California*, 291 U.S. 82 (1934)	10, 12, 17
Shott v. *Tehan*, 337 F.2d 990 (6th Cir. 1964)	1
Tehan v. *Shott*, 382 U.S. 406 (1966)	2
Tot v. *United States*, 319 U.S. 463 (1943)	11, 12
United States v. *Gainey*, 380 U.S. 63 (1965)	12
United States v. *Romano*, 382 U.S. 136 (1965)	12, 13
Yee Hem v. *United States*, 268 U.S. 178 (1925)	11

STATUTES AND AUTHORITIES: Page

Loss, *Blue Sky Law* (1958 ed.) 4, 9

1 Loss, *Securities Regulation* (1961 ed.) 4

Ohio Securities Act ("Ohio Blue Sky Law")
Ohio Rev. Code Sections:

1707.01-1707.45 3

1707.02 4

1707.02(G) 3

1707.44 3

1707.45 3

Uniform Securities Act, Section 402(d) 10

28 U.S.C. § 1254 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA *ex rel.* EDGAR I. SHOTT, JR.,
Petitioner

v.

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

PRIOR PROCEEDINGS AND JURISDICTION OF THIS COURT

This is the second time that the petition for habeas corpus involved in this case has been brought before this Court for review. On the first occasion, the Court of Appeals had granted the writ; on remand, the District Court had ordered a new trial for Petitioner or his unconditioned release in the event that such a new trial was not promptly afforded him. *Shott* v. *Tehan*, 337 F.2d 990 (6th Cir. 1964). The sole ground on which the court below granted the writ was that the prosecuting attorney in Petitioner's criminal trial in the state court had commented to the jury on Petitioner's failure to take the stand. This Court granted

certiorari, and five Justices voted to reverse on the ground that this Court's decision in *Griffin* v. *California,* 380 U.S. 609 (1965), declaring unconstitutional a state prosecutor's comment on a defendant's failure to testify, was not to be retroactively applied. Therefore, Petitioner could not take advantage of the *Griffin* ruling as a ground for habeas corpus. Justices Black and Douglas dissented. *Tehan* v. *Shott,* 382 U.S. 406 (1966). This Court remanded the case to the Court of Appeals for consideration of those claims in Petitioner's habeas corpus petition which that Court had not considered.

The principal ground for hab as corpus urged by Petitioner, and undecided by the court below in the initial appeal, was that he was denied due process of law by the application in this case of that provision of the Ohio Blue Sky Law which shifts the burden of proof to the signer of a single promissory note to establish by a preponderance of the evidence that this single transaction was *not* part of a public offering of securities. This issue was argued in the Court of Appeals on remand, and that court held on August 19, 1966 that the provision shifting the burden of proof to the defendant to establish his innocence was constitutional. *Shott* v. *Tehan,* F.2d 6th Cir. 1966) (annexed hereto as Appendix A). A motion for rehearing was filed and denied on September 28, 1966. Jurisdiction of this court to review that decision is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

The constitutional question of due process of law presented here is whether a defendant who borrows money on a single promissory note may, by operation of a statutory presumption of guilt based upon an admittedly innocent transaction, be convicted of mak-

ing an illegal public offering of securities unless defendant affirmatively proves his innocence by preponderance of the evidence that the note was not part of a public offering of securities.

STATUTE INVOLVED

The statute involved is the Ohio Securities Act, Ohio Rev. Code §§ 1707.01-1707.45 (herein referred to as the "Ohio Blue Sky Law") and particularly Sections 1707.02(G), 1707.44 and 1707.45 which are set forth in relevant part in Appendix B.

STATEMENT OF THE CASE

Petitioner Shott was found guilty of violating the Ohio Blue Sky Law and sentenced to five years in the Ohio Penitentiary. The entire case presented by the State was based upon proof that Petitioner Shott signed a single promissory note for $2250 and delivered it to a personal friend, Patrick Sestito.[1] This note was repaid in full at maturity.

---

[1] That promissory note (App. 83a) read as follows:

"$2250.00 Cincinnati, Ohio, September 28, 1960

Sixty (62) [sic] days after date for value received I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 dollars with Interest at the rate of ..... per centum per annum at ..... and I hereby authorize any Attorney at Law to appear in any Court of Record in the State of Ohio, or any other State in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me in favor of the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal.

SHOTT INVESTMENT CO.

By Edgar I. Shott, Jr.

No. .....

Due November 29, 1960"

Based upon that single act, Petitioner was convicted of selling an unlicensed security and selling securities without being licensed as a securities dealer and was sentenced to five years' imprisonment.

The trial court instructed the jury that under the Ohio Blue Sky Law the issuance of a promissory note is a "sale" of a security. However, that Law creates no criminal or civil liability where there is no "public offering" of securities. This is true of state blue sky laws generally. See Loss, *Blue Sky Law,* 369-74 (1958 ed.); *cf.,* 1 Loss, *Securities Regulation,* 653-65 (1961 ed.). Thus, the Ohio Law provides that: "Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public * * *." Section 1707.02 (G). Under this provision of the Blue Sky Law, the requisite "public offering" constitutes, as the court instructed, the following:

> "The term 'Offered to the public' means this: that they are open to common or general participation to any and all persons, as distinguished from an offer to a particular person or persons in the course of legitimate business, or in the course of usual and ordinary borrowing of money. The instrument is not exempt if it was offered for sale directly or indirectly to the public, as I have defined that term. (App. 78a)."[2]

As will be demonstrated next, the State offered no proof that the single promissory note was part of a public offering of securities by Shott. Petitioner Shott therefore would necessarily have been acquitted except for a *procedural* provision of the Blue Sky Law—which we here assert violates due process of

---

[2] The record references are to Appellant's Appendix in the Court of Appeals, filed with this Petition, and referred to as "App."

law—shifting the burden of proof to defendant to prove affirmatively that the single note he signed was *not* part of a public offering of his securities.

The record is clear that Petitioner borrowed money from Patrick Sestito and delivered to him the single promissory note involved in this case. However, the evidence shows conclusively that the transaction in question was a loan from a personal friend. That friend, Sestito, was the sole witness as to the character of the transaction. He testified to a long acquaintance with Petitioner Shott, and that Shott had at least twice been his counsel (App. 34a). On September 28, 1960, as he often did, Sestito paid a casual social call on Shott (App. 28a, 31a). There were no advance arrangements made for Sestito's visit (App. 29a). Sestito testified:

> Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960? A. No, sir, not that I can remember.
>
> Q. Had you telephoned to Ed? A. No, sir.
>
> Q. Or made any contact with him? A. No, sir, I just dropped in.
>
> Q. When you dropped in, was there any purpose for your dropping in on that date? A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him. (App. 29a).

Sestito testified that when he went into attorney Shott's office, Shott said that he would like to borrow some money from him and would give Sestito 12½ percent interest for the use of his money for 60 or 62 days' time (App. 28a, 30a, 31a). Sestito testified that he vaguely recalled that in the course of the conversation Petitioner had shown him a copy of a credit state-

ment on the Shott Investment Company—a fact that is entirely consistent with the making of a personal loan (App. 30a, 31a). However, it is clear that Sestito did not make his loan on the basis of that report. Sestito said:

> Q. Did he ask you for any money? A. Yes, he did.
>
> Q. Did he ask you for any particular amount? A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.
>
> Q. What sounded so good? A. Well, the percentage, twelve and half per cent. (App. 30a).

Sestito agreed to loan Shott $2,000, and the two parties decided to lump the principal and interest on the face of the note (App. 36a).

Sestito testified that he loaned Shott the money strictly on the basis of his long acquaintance, personal friendship and his trust that Shott would pay the money back (App. 36a). Shott signed the note on behalf of the Shott Investment Company, a family partnership entered into for tax reasons. However, the record is clear that Sestito considered the note to be Shott's personal obligation and was not influenced by and did not rely upon the partnership. He said:

> Q. [By Appellant's counsel] You didn't pay any attention to how it was signed or anything else? A. That's right. (App. 37a).

It is clear from the face of the note and the testimony that there was no security for the loan except Shott's own credit (App. 36a). The transaction did not contemplate the subsequent delivery of any stock

or other securities to Sestito; nor did Sestito thereby gain an ownership interest in any corporation, partnership, or other enterprise. Sestito acknowledged that Shott "didn't sell [him] anything" (App. 36a). Further, the State, on direct examination, brought out the fact that this was the *only* loan transaction between Shott and Sestito:

> Q. [By the prosecution] Mr. Sestito, had you made any similar, any loan transactions with Mr. Shott like the one you just described to the jury prior to that date? A. No, sir.
> Q. Or since that date? A. No, sir. (App. 38a).

It was further established that the Sestito note was repaid in full on the due date (App. 37a). There was no claim or evidence of any fraud or impropriety in the transaction. Thus, the loan was merely a single, isolated transaction between these two old friends.

The whole transaction was summarized by the prosecution's witness as follows:

> Q. Actually, when you went into Mr. Shott's office on the 28th day of September, Mr. Shott told you that he would like to borrow some money from you, didn't he? A. That's right.
> Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time? A. That's right.
> Q. And you trusted Ed Shott? A. That's right.
> Q. And you trusted his ability to pay it back to you? A. Yes, sir, I did. (App. 36a).

The single Sestito loan transaction constituted the entire case for the State. There was no evidence, nor was there an intimation, that Shott was dealing in traditional "securities"—stocks and bonds; it was affirmatively established that Petitioner had entered

into only a single loan transaction with Sestito. Finally, there was no evidence of fraud, the note was paid in full when due.

It appears from the opening statement of Petitioner's counsel that it was his original intention to put Petitioner on the stand in his own defense (App. 22a). However, when the State rested its case solely on the testimony of the single Sestito loan, Petitioner's counsel, believing that the record affirmatively showed that the transaction was exempt under the Blue Sky Law and that the burden of proof, if any, on Petitioner had been met through the State's own examination and Petitioner's cross-examination of the witness Sestito, did not put Petitioner on the stand or introduce further evidence. Instead, on the basis of the evidence, which affirmatively showed that the transaction was not part of a public offering of securities, Petitioner moved for a directed verdict. The state trial court overruled this motion without permitting counsel even to present his argument (App. 41a).

On this record, the trial court instructed the jury that the Blue Sky Law imposed absolute liability and that the Sestito promissory note was a security—whether or not Shott intended to issue or sell it as a security (App. 76a). However, as noted above, the trial court stated that a particular transaction does not fall within the provisions of the Blue Sky Law unless it was part of a "public offering" of securities. As for the burden of proving whether or not the issuance of the note was part of a "public offering," the trial court said:

> "In determining whether this instrument is exempt, you must follow the provision of Section 1707.45, which reads in part as follows:

'In an indictment under Section 1707.44, it shall not be necessary to negative the existence of facts which would bring a security within Section 1707.02, sub-section "G", the one applying to this case which I read. It further provides:

'The burden of proof shall be upon the party claiming the benefit of said section; that is, the burden of proof is upon the party who wants the benefit of this instrument, if it is a security, being exempt from the other provisions of the law.'

"The meaning of this provision is that it is not the duty or burden of the State to show that the instrument is not exempt. *The above provision creates a presumption that an instrument which is a security is not exempt. The statutory provision makes it the duty or burden of the Defendant to prove by a preponderance of the evidence that the instrument is exempt; that is, that it was not offered directly or indirectly for sale to the public."* (App. 78a-79a) (Emphasis added).

Thus, under this procedural provision of the Blue Sky Law, Petitioner was convicted solely upon proof of the issuance of a single promissory note, without the State offering any proof that it was part of a public offering of securities.

REASONS FOR GRANTING THE PETITION

This petition raises serious constitutional issues relating to criminal prosecutions under state Blue Sky Laws. Although this petition focuses upon the provisions of the Ohio Blue Sky Law which shift the burden of proof to the defendant, this issue is of importance throughout the nation because provisions similar to the challenged procedural section are found in most state securities acts. See, Loss, *Blue Sky Law,*

Section 403, p. 381 (1958 ed.). See also, *Uniform Securities Act,* Section 402(d).

The procedural provisions challenged here authorize shifting the burden of proof to a defendant on the basis of evidence which is neither inculpatory nor reasonably consistent with an inference of guilt. If the trial court's instruction is sustained, that proof of issuance of a single promissory note is constitutionally sufficient to shift the burden of proof to a defendant to show that he has not made a public offering of securities—then any businessman who signs a note to help finance his business or any individual who borrows money can be indicted and subjected to a public trial. All the prosecution need do is to show the execution of a single note—which all parties agree is insufficient evidence to convict. The defendant must then assume the burden of proof and disclose all his previous transactions to establish that he was not offering notes to the public generally. In other words, the defendant must prove his own innocence.

The decisions of this Court relating to the validity of statutory presumptions of guilt make it clear beyond question that the burden of proof in a criminal case cannot constitutionally be shifted to the defendant solely upon proof of an ordinary innocent act such as the signing of a promissory note. *Morrison* v. *California,* 291 U.S. 82 (1934), sets strict constitutional limitations upon such a transfer of the burden of proof:

> "The limits are in substance these, that *the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation,* . . . ." (291 U.S. at 88-89) (Emphasis added).

There, the Court struck down the statutory transfer of the burden of proof where the State's evidence consisted solely of proof of possession of agricultural

land, "an act that carries with it not even a hint of criminality." *Id.*, at 90. The Court said, "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . ." *Id.*, at 91. It must "awaken a belief that [Petitioner] is guilty, if he fails to come forward with excuse or explanation." *Id.*, at 90.

Moreover, where this Court has sustained statutory presumptions of guilt, it has consistently noted that the conduct proved was so extraordinary that it indicated on its face a sinister or unlawful plan of action. *Casey* v. *United States*, 276 U.S. 413, 418 (1928); *Yee Hem* v. *United States*, 268 U.S. 178, 184 (1925); *Hawes* v. *Georgia*, 258 U.S. 1, 5 (1922); *Adams* v. *New York*, 192 U.S. 585, 599 (1904). These cases have been reviewed in *Tot* v. *United States*, 319 U.S. 463 (1943).[3]

---

[3] In *Adams* v. *New York*, the Court sustained a presumption of guilt based upon proof of possession of policy slips because "[a]ccidental and innocent possession of such a paper would be extraordinary and unusual. . . ." 319 U.S. at 470. In *Hawes* v. *Georgia*, discovery of an unlicensed still on defendant's property was prima facie evidence that he had knowledge of its existence. "The inference so accorded with common experience that a statutory provision scarcely was necessary to shift the burden of proof." *Id.*, at 471. In *Yee Hem* v. *United States*, proof of defendant's possession of opium was presumptive evidence that it had been illegally imported because "no lawful purchase of smoking opium could occur in this country and . . . therefore, possession gave rise to sinister implications." *Ibid.* Finally, in *Casey* v. *United States*, upon evidence that defendant had clandestinely and unlawfully sold morphine from an unstamped package, the Court sustained the statutory presumption that he had unlawfully purchased the morphine from an unstamped package. This presumption was "not unreasonable or beyond the realm of common experience." *Id.*, at 472.

Finally, in *United States* v. *Gainey*, 380 U.S. 63 (1965), this Court sustained the constitutionality of a statutory presumption making proof of a defendant's presence sufficient evidence of guilt of "unlawfully carrying on" the business of a "distillery," because presence near a still arose in "an atmosphere pregnant with illegality . . . ." *Id.*, at 67.

Accord, United States v. *Gainey,* 380 U.S. 63, 67 (1965). The most recent statement of the Supreme Court on this issue is found in the case of *United States* v. *Romano,* 382 U.S. 136 (1965), where the Court quotes *Tot* v. *United States,* 319 U.S. at 467, as follows:

> "Such a legislative determination would not be sustained if there 'was no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience . . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.' " 382 U.S. at 139.

These constitutional principles require that this Court declare the use of the presumption and the shift of the burden of proof, *in the circumstances of this case,* to be a violation of the Fourteenth Amendment. All the State need prove to shift the burden is the making of a promissory note—an act totally innocent on its face. Certainly, this act does not meet the *Morrison* standard which requires the State's evidence to have a sinister or inculpatory significance. Indeed, the Court of Appeals made no attempt to justify the transfer of the burden on these grounds. The sole justification it found to shift the burden was finding of a disparity in the convenience of proof. (Appendix A, p. 25, *infra*). However the *Tot* decision expressly rejects the comparative convenience of producing evidence as a self-sufficient basis for shifting the burden of proof to the defendant. 319 U.S. at 465-470.

Further, there is nothing inherent in borrowing money which makes it reasonable to infer that the maker of a single promissory note was in fact engaged in the business of making a public offering of promissory notes. To sustain this presumption would mean that common experience teaches that every person who signs a promissory note with a bank or savings and loan company is presumptively guilty of the crime of engaging in an offering to the public at large of his promissory notes. This presumption is obviously contrary to the facts. Clearly, here, the

> "inference is so strained as not to have a reasonable relation to the circumstances of life as we know them . . . ." 382 U.S. at 139.

The Court of Appeals entirely disregarded the fact that the trial court instructed the jury that proof of an unregistered promissory note itself is sufficient to shift the burden of proof to Petitioner and to create a presumption of a public offering of securities sufficient to convict Petitioner. Rather, it examined the record and reviewed the evidence in general to attempt to find some justification for Petitioner's conviction. However, looking at the record as a whole, there is nothing that supports a rational inference that the promissory note in this case was part of a public offering of securities. The note was signed by Petitioner Shott as a partner in a family partnership formed for the purpose of making family investments.[4] The particular investment which Petitioner

---

[4] The evidence on this point consists of an admission by Petitioner's trial counsel in his opening statement as follows:

> "Now, the evidence will show that the note was signed, 'Shott Investment, by Edgar I. Shott, Jr.' Now, the Shott Investment Company, as the evidence will indicate, was a partner-

intended to make was to loan the money to a man named Stickler who offered an extraordinary rate of interest.[5] Petitioner's friend, Sestito, who loaned the money, was induced to do so because he shared in the high rate of interest. Sestito, however, was not informed as to where Petitioner was going to loan the money. He relied for payment of the note solely on Petitioner's ability to meet his obligation.

The device of a family partnership for the purpose of investing money cannot by any stretch of the imagination be the basis of an inference that the family partnership was making public offerings of securities. Nor can the admission that the money borrowed on the promissory note in this case would be reloaned by Shott to Stickler at high rates of interest have any

---

ship, consisting of Edgar I. Shott, Sr., the Defendant's father, and Edgar I. Shott, Jr., the Defendant, Edgar I. Shott, Jr., as Trustee for his five-year old son, Gregory. The evidence will show the Defendant established this partnership upon the advice of an attorney specializing in tax laws in order to place income in the hands of various relatives for whom he wished to provide, and for the legitimate purpose of reducing his own income tax payments. That is all the Shott Investment Company was, or was ever intended to be." (App. 23a).

[5] Petitioner's trial attorney in his opening statement has admitted the purpose of the loan as follows:

"Now, the Defendant will admit and concede precisely what his idea, what his scheme, plan and system was in entering into this loan transaction with Pat Sestito. It was simply this: The Defendant was loaning money to one Leslie D. Stickler, who was borrowing it regularly from him for the purpose, according to Stickler, of enabling Stickler to make short-term, high-interest loans to contractors. When Shott borrowed the money from Sestito, it was his intention; that is, Shott's intention and plan to loan this money to Stickler, and to pay Sestito for the use of his money; that is, Sestito's money, one-half of the amount which Stickler had agreed to pay Shott for the use of Shott's money." (App. 22a-23a).

relevance in creating an inference that the family partnership was engaged in making a public offering of its promissory notes. Borrowing money to make profitable investments is one of the most commonplace occurrences imaginable. Practically everybody does it. It is incredible that a man who borrowed money to make an investment could be indicted on that fact alone and compelled to prove his innocence by demonstrating that he had not thus been engaged in a public offering of securities.

Under the instruction of the trial court, the jury could not and did not consider the unsupported inferences suggested by the Court of Appeals in its opinion. The precise instruction of the trial court was as follows:

> "The statutory provision makes it the duty or burden of the Defendant to prove by a preponderance of the evidence that the instrument is exempt; that is, that it was not offered directly or indirectly for sale to the public." (App. 79a).

This instruction was given after an argument in which the prosecution relied solely on Petitioner's failure to take the stand. Over and over again, the prosecutor commented to the jury that this was the controlling factor.[6]

---

[6] The prosecutor in closing argument stated:

> "How could you have proof, how could you learn whether or not there was more than one sale? You could learn it only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on the witness stand and look you in the eye and say, 'Ladies and gentlemen of the Jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito.' He could tell you that, and he's got the burden of

In the light of the above instruction, it is impossible to say, as the opinion of the court below does, that the jury gave the slightest consideration to the strained inferences which the Court of Appeals attempts to draw from the record. That opinion carefully omits any reference to the above instruction. We assert that had that instruction not been given, and had the prosecution been compelled to argue the inferences indulged in by the Court of Appeals below, there would have either been a directed verdict or a verdict of acquittal.

The central authority relied on by the court below to justify shifting of the burden of proof in this case is *Catterlin* v. *State,* 292 U.S. 614 (1934). That case was appealed to the Supreme Court almost thirty years ago. The record consisted of a stipulation with respect to the evidence produced at the trial. That stipulation shows that the State proved that Catterlin had sold for $50.00 apiece 2,700 membership certificates in International Corporation of Harper Heirs, an Ohio corporation. To induce the sale, Catterlin had told the purchasers of the membership certificates that they would receive from four to seven times as much as other heirs to the estate. There could be no question from the stipulation filed in this Court that the State had proved beyond a reasonable doubt a

---

proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify. (App. 67a).

"Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, 'You can't get me; you can't convict me.' That is what he said. (App. 49a).

"He doesn't dare take that stand and tell you about his transactions and dealings." (App. 52a).

public offering of fraudulent securities and that the evidence fully met the *Morrison* standard. On this record the Ohio court instructed the jury that the burden of proof was on Catterlin to show that the 2,700 certificates which he had sold were exempt under the laws of Ohio.

Petitioner in his brief before the court below cited this case to support his contention that the burden of proof could *not* be shifted where the only proof introduced by the State was the issuance of a single promissory note. It was not cited by the Respondent. Frankly, we do not understand how it can possibly be an authority to sustain the position of the court below in this case. Yet it is the only authority which the court is able to cite.

CONCLUSION

For the reasons set forth above, this Court should grant the instant Petition for Certiorari.

Respectfully submitted,

THURMAN ARNOLD
JAMES F. FITZPATRICK
Counsel for Petitioner

Of Counsel:

ARNOLD & PORTER
1229-19th Street, N. W.
Washington, D. C. 20036

November 17, 1966

BLANK

PAGE

APPENDIX A

Decision of the Court of Appeals

No. 15538

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, EX REL EDGAR I. SHOTT, JR.,
Relator-Appellant,

v.

DAN TEHAN, Sheriff of Hamilton County,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

Decided August 19, 1966.

Before: O'SULLIVAN and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

CELEBREZZE, Circuit Judge. Appellant was found guilty by a jury in the Common Pleas Court of Hamilton County, Ohio on two counts of an indictment charging violation of the Ohio Securities Act, Sections 1707.01 through 1707.45, Ohio Revised Code. After exhausting his State remedies he instituted an action for a writ of habeas corpus under the provisions of 28 U.S.C., Sections 2241-2254, in the United States District Court, Southern District of Ohio, Western Division alleging violation of due process, guaranteed by the Fourteenth Amendment. The District Court dismissed Appellant's petition for a writ of habeas corpus and appeal was taken to this Court. On November 14, 1964,

this Court, relying on *Malloy* v. *Hogan*, 378 U.S. 1 (1964), reversed the District Court and granted Appellant's writ, holding that comment in his argument to the jury by a State prosecuting attorney on Appellant's failure to take the stand, violated the Fifth Amendment to the Constitution of the United States which was protected against abridgment by the States by the Fourteenth Amendment. *Shott* v. *Tehan*, 337 F.2d 990 (C.A. 6, 1964). The Supreme Court later in *Griffin* v. *California*, 380 U.S. 609 (1965), ruled to the same effect as our opinion in *Shott*. Thereafter the Supreme Court granted certiorari in *Shott*, and affirmed this Court's holding that the prosecutor's comment violated Shott's constitutional rights. However, it vacated this Court's order on the ground that *Griffin* should not be applied retroactively except to pending criminal cases, and held that an application for a writ of habeas corpus pending at the time *Griffin* was decided, was not a pending criminal case. *Tehan* v. *Shott*, 382 U.S. 406 (1966). It remanded the case to this Court for consideration of other claims contained in Appellant's petition for writ of habeas corpus which this Court had not considered.

Appellant is a member of the Bar of the State of Ohio, and a partner in the Shott Investment Company, located in Cincinnati, Ohio. On the 28th day of September, 1960, he issued to one Patrick Sestito a promissory note in the sum of $2250.00 which represented principal in the sum of $2000.00, and interest in the sum of $250.00, payable sixty days after date, endorsed "Shott Investment Company by Edgar I. Shott, Jr."[1] Appellant at the time of issuance

---

[1] "Sixty (62) [sic] days after date for value received I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 dollars with Interest at the rate of ..... per centum per annum at ..... and I hereby authorize any Attorney at Law to appear in any Court of Record in the State of Ohio, or any other State in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me in favor of the holder

of this note was not licensed as a security dealer. He was indicted by the Grand Jury of Hamilton County, and charged with (1) selling securities without having been licensed as a security dealer, and (2) selling an unlicensed security.

The two-count indictment, under which the Appellant was charged, tried and convicted, was based upon the provisions of Ohio Revised Code Section 1707.44 (A) and (C).[2]

It is to be noted that Section 1707.44 (C) uses the words "any security" in its prohibitory language, and Section

---

hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal.

Shott Investment Co.
By Edgar I. Shott, Jr.

No. .....

Due November 29, 1960"

[2] "Section 1707.44(A). No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L), inclusive, and (O) to (Q), inclusive, of sections 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code, or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities."

"Section 1707.44(C). No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

"(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the Revised Code, has not been registered by description or qualified, and is not the subject matter of a transaction that has been registered by description; • • •."

1707.44 (A) prohibits (1) engaging in the business of acting as a broker for others (2) selling securities or offering them for sale, or (3) engaging in the business of buying, selling or dealing in securities otherwise than through a licensed dealer.

Appellant contends that the Ohio Securities Act, under which he was convicted, is invalid under the due process clause of the Fourteenth Amendment because the procedural provisions create an evidentiary presumption that Appellant made an unlawful public offering of his promissory note and further shifted to the Appellant the burden of proving his innocence.

Appellant, in his attempt to establish that the Ohio Securities Act violates the due process clause of the Fourteenth Amendment, relies mainly on *Yee Hem* v. *United States,* 268 U.S. 178 (1925); *Casey* v. *United States,* 276 U.S. 413 (1928); *Morrison* v. *California,* 291 U.S. 82 (1934); *Tot* v. *United States,* 319 U.S. 463 (1943); *Speiser* v. *Randall,* 357 U.S. 513 (1958); and *United States* v. *Romano,* 382 U.S. 136 (1965).

These cases set forth the law governing statutory presumptions and the constitutional validity of shifting the burden of proof to the defendant. We concede that the Fourteenth and Fifth Amendments set limits upon the legislature to make proof of one fact, or groups of facts, proof of the ultimate fact upon which guilt is predicated. In the instant case we find that the shifting to the Appellant of the burden of proving by a preponderance of the evidence the exempt status of the promissory note does not fall within the factual basis of the cases relied upon by Appellant, and is not unreasonable, nor does it offend any principle of justice, nor does it constitute a denial of due process of law.

The Ohio Securities Act, Ohio Revised Code Section 1707.01, encompasses promissory notes within the definition

of securities subject to the Act. It provides in Section 1707.02 (G) that commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public. Section 1707.45[3] places upon the Appellant the burden of claiming the benefits of Section 1707.02 (G).

Where an individual or corporation engages in occupations in which the public has an interest, that occupation may be regulated under the police power of the State. *Nebbia* v. *New York*, 291 U.S. 502. The power of the State to provide for the general welfare authorizes it to establish such regulations as will secure or tend to secure the people against ignorance often due from an incomplete disclosure of facts by one in the unique position to know the facts. The Ohio Securities Act, commonly referred to as Ohio Blue Sky Law, was adopted to prevent fraudulent exploitations through the sale of securities. The constitutional validity of the Ohio Securities Act regulating the sale of all securities has been upheld in *Hall* v. *Geiger Jones Company*, 242 U.S. 539 (1916). We believe the provisions of Ohio Revised Code Section 1707.44 regulating the sale of all securities unless specifically exempted, and the provision of Ohio Revised Code Section 1707.45 which places the burden upon the defendant to show that securities are sold under such circumstances as to bring the sale within one of the exemptions provided by the Act, are constitutionally within the police power of the State of Ohio.

---

[3] "Section 1707.45, Revised Code of Ohio. In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary to negative the existence of facts which would bring a security within section 1707.12 or 1707.15 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04 or 1707.06 of the Revised Code, or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. *The burden of proof shall be upon the party claiming the benefits of any such sections.*" (Emphasis added)

Provisions similar to Ohio Revised Code Section 1707.45 are found in most State securities acts. *Loss and Cowett, Blue Sky Law, Little, Brown & Company,* 1958 Ed., Section 403, page 381. See also *Uniform Securities Act,* Section 402(d).

The validity of this Section has been affirmed by State courts on previous occasions and courts have upheld the shifting of the burden of proof even in the absence of specific statutory language. *Kreutzer* v. *Westfahl,* 187 Wisc. 463, 204 N.W. 595 (1925); *State* v. *Voorhies,* 169 La. 626, 125 So. 737 (1930); *Commonwealth* v. *Freed,* 106 Pa. Super. 529, 162 Atl. 679 (1932); *Nelson* v. *State,* 355 P.2d 413 (1960); *Catterlin* v. *State,* 16 OLA 410 (1939), appeal dismissed for want of substantial federal question, 128 O.S. 110, 190 N.E. 578, 292 U.S. 614, citing *Morrison* v. *California,* 291 U.S. 82, 88-91; *Casey* v. *United States,* 276 U.S. 413, 418; *Mugler* v. *Kansas,* 123 U.S. 623, 674. See also *Loss, Securities Regulations, Little, Brown & Co.,* 2 Ed. 1961, Vol. 1, page 712; *C. C. H. Blue Sky Law Reporter,* Paragraph 3765.

In *Catterlin* v. *State, supra,* the court held the legislature had the power to declare the sale of securities without a license was unlawful, and that the legislature further had the right to place on persons accused of violating the Blue Sky Law the burden of proving the sales made by them were within the exemptions on which they relied. In dismissing the appeal for lack of federal question, the Supreme Court cited *Morrison* v. *California, supra,* and *Casey* v. *United States, supra.* Turning to *Morrison* v. *California, supra,* Mr. Justice Cardozo made these pertinent statements:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the State in criminal prosecutions and cast on a defendant. The limits are in substance these, that the State shall have proved enough to make it just for the defendant to be required to repel what has been proved

with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

"It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime (citation omitted). There are, indeed, 'presumptions that are not evidence in a proper sense but simply regulations of the burden of proof.' Casey v. United States, supra. Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify the others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance (Yee Hem v. United States, supra; Casey v. United States, supra), or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception."

The Ohio Blue Sky Law, as do similar State security regulations, places the burden on an offeror or seller of a security to determine if the security may be sold lawfully. Once the seller has determined that a security falls within a class of exempt securities, that knowledge is peculiarly within the personal knowledge of the seller. Considering the purpose of the State Securities Act, it cannot be said that lifting the burden of proof from the State in criminal prosecutions and casting upon the defendant the defense that he comes within an exemption is unreasonable and unfair. Here there is a general prohibition which is applicable to everyone who is unable to bring himself within the range of an exemption.

While the Ohio Statute places the burden upon a defendant to avail himself of the exempt status,[4] it does not diminish the proof necessary for conviction imposed upon the state. The burden remains with the State to offer proof of the essential elements of the indictment; that the offense was committed in Hamilton County, Ohio; that Appellant was selling securities without having been licensed as a security dealer; and that Appellant was selling unlicensed securities.

There is ample evidence in the record that the State of Ohio sustained its burden of proof by establishing each of the foregoing, and having done so, it was incumbent upon the Appellant to avail himself of the exemption provisions of Ohio Revised Code Section 1707.02 (G), by introducing evidence that Appellant came within the exemption provision.[5] The Appellant chose not to testify, which was his constitutional right, and introduced no evidence on his behalf, except his attempt to show that this was purely a loan between friends, by the cross-examination of the State's chief Witness Sestito. However, this in no way diminished the duty of the State to prove the Appellant guilty beyond a reasonable doubt, and the Court properly charged the jury to that effect as follows:

"* * * If you do not find that the State has proved beyond a reasonable doubt all these essential elements

---

[4] The shifting of the burden of proof to the defendant has its counterpart in Federal statutes which have been upheld against constitutional attack: Section 5851, Title 26 U.S.C., *Sipes* v. *United States*, 321 F.2d 174 (C.A. 8, 1963); *Stark* v. *United States*, 316 F.2d 45 (C.A. 9, 1963); *Frye* v. *United States*, 315 F.2d 491 (C.A. 9, 1963, *cert. denied* 378 U.S. 849); *United States* v. *Forgett*, 349 F.2d 601 (C.A. 6, 1965); The Narcotics Drug Import and Export Act, 21 U.S.C.A., Sections 174, 176a(2) (c) (f) (11).

[5] Keeping in mind the broadly remedial purposes of Federal securities legislation, imposition of the burden on an issuer who would plead the exemption seems to us fair and reasonable. *S.E.C.* v. *Ralston Purina Co.*, 346 U.S. 119.

which I read to you; namely, that this instrument was sold or disposed of by Edgar I. Shott to Patrick Sestito in Hamilton County, Ohio, on September 28th without a license and without being registered, and that said instrument is a security, if you do not find that the State has proved all those elements beyond a reasonable doubt, then your verdict must be not guilty of both charges in the indictment.

"But, even though you do find that the State has proved beyond a reasonable doubt all the essential elements of the crimes charged in the indictment, if you also find that the Defendant has proved by a preponderance of the evidence that this instrument is an exempt security under the rules I have given you, then your verdict must be not guilty of both counts of the indictment."

The evidence did not demonstrate that this was a single private transaction involving the giving of a promissory note to a friend for a personal loan as alleged by Appellant. The jury may have properly considered the necessity for Appellant to operate as Shott Investment Company and to endorse the note "Shott Investment Company, by Edgar I. Shott, Jr." if all he was interested in was to issue a single promissory note in the amount of $2,000.00, carrying 12½ percent interest to a friend. We believe the answer to this is best found in the admissions of Appellant's counsel in his opening statement:

"Now, the Defendant will admit and concede precisely what his idea, what his scheme, plan and system was in entering into this loan transaction with Pat Sestito. It was simply this: The Defendant was loaning money to one Leslie D. Stickler, who was borrowing it regularly from him for the purpose, according to Stickler, of enabling Stickler to make short-term, high-interest loans to contractors. When Shott borrowed

the money from Sestito, it was his intention; that is, Shott's intention and plan to loan this money to Stickler, and to pay Sestito for the use of his money; that is, Sestito's money, one-half of the amount which Stickler had agreed to pay Shott for the use of Shott's money."

The jury could reasonably find that the Appellant was issuing this note for the sole purpose of investing the money with Stickler, and not as a personal loan. This is further demonstrated by the fact that Sestito was to receive a profit of one half of the amount that Stickler agreed to pay Appellant. Appellant was to share equally with Sestito in the benefits of profit derived from Stickler. Appellant thereby was acting as broker for the investment of Sestito's money with Stickler. This is further developed by Sestito's testimony.

"Q. Now, let me ask you, Mr. Sestito, if on that date you had any conversation with Mr. Shott about the Shott Investment Company? A. Yes, sir, we did.

Q. And what was the conversation you had? A. Well, I mean of course, he approached me on this investment, and he told me—he asked me if I wanted to make some money. Of course, naturally, everybody wants to make money. And so I asked him a few questions about it and, of course, he told me that this money was being invested on financing buildings, and so forth.

Q. Well, had you heard or did you have any knowledge about this Shott Investment Company before you went there on that day? A. Well, sir, I mean I have heard around. I mean, you know, there was such an investment going around.

Q. And what was it that Mr. Shott told you about the company and the investments that were being made? A. Well, I mean, of course, naturally, I asked him if I could check it out, of course, knowing Mr. Shott I

figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing it in buildings and financing, I know finance companies make a lot of money, I do know that.

Q. Did he say who was investing it in buildings, and financing and making a lot of money? A. No, sir, he didn't state that.

Q. Was there any conversation had with you at this time about your participating in those investments? A. Sir, I didn't understand that.

Q. Did he ask you for any money? A. Yes, he did.

Q. Did he ask you for any particular amount? A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good? A. Well, the percentage, twelve and a half per cent.

Q. What were the arrangements that were to be made? A. Twelve and a half per cent for 60 days.

Q. Let me ask you if, in the course of your conversations about the Shott Investment Company, that you had with Mr. Shott on that day in his office, he showed you anything about the company? A. Well, yes, he showed me, oh, I don't know what you would call it. An eight and a half by eleven stationery, plaque more or less, showing about these Shott investments.

Q. What do you mean showing about the Shott investments? A. Of course, I couldn't read it. I couldn't remember it. It told about the company, Shott's investments.

Q. Did it have writing or figures or what did it contain? A. Well, it just stated, you know, like—told about the company, like it's been in effect since—of course, I couldn't remember the date. I think it said something like 1955.

• • •

Q. Now, between September the 28th, 1960 and November the 29th, 1960, did you come into contact with Mr. Shott? A. Yes. When it was due, I mean his secretary called me and asked me if I wanted to parlay it or—

Q. Wanted to what? A. Wanted to, you know, to parlay it.

Q. What do you mean parlay it? A. Well, to let it ride, or, you know, or draw the profit out. Of course, I told her I wanted to, you know, draw it out.

Q. She asked you if you wanted to let it ride? A. Yes, sir.

Q. What did you understand that to mean? A. Well, I mean to invest it all over again.

Q. Reinvest it? A. Yes, sir.

Q. Did you reinvest it? A. No, I didn't.

Q. What did you do? A. I withdrew my money.

Q. Well, did you go there to the office? A. Yes, sir, I went there to the office and I received a check.

Q. How many checks did you receive. A. One check for the full amount.

Q. $2,250.00? A. Yes, sir."

The exempt status is not conditioned upon any specific number of issues, therefore the number of notes issued is not determinative of whether the offering is exempt under the provisions of the Ohio Securities statutes.

The United States Supreme Court in its interpretation of exemptions under the Federal Securities Act, in *Securities Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119-125, stated:

> "Indeed nothing prevents the commission, in enforcing the statute, from using some kind of numerical test in deciding when to investigate particular exemption claims. *But there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation.*" (Emphasis added)

Appellant further attacks the Ohio Securities Act by asserting that it violates the Fourteenth Amendment because the Act, as applied, is unconstitutionally vague and indefinite. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963).

Ohio Revised Code Section 1707.01 defines the various terms used in the Act, including a comprehensive definition of a security. Ohio Revised Code Sections 1707.02 and 1707.03 designate certain securities and certain transactions exempt from the requirement of registration. Ohio Revised Code Section 1707.44 (A) provides in part that "No person shall * * * sell securities * * * otherwise than in transactions through or with a licensed dealer", unless specifically exempted by other Sections of the Act. Ohio Revised Code Section 1707.44 (C) provides in part that "No person shall knowingly and intentionally sell * * * any security * * * which is not specifically exempt." Ohio Revised Code Section 1707.45 places the burden upon the defendant to bring a transaction within an exemption.

The Ohio Securities Act, prohibiting the sale of securities which are not otherwise exempt, forewarns of its reach and coverage. The language sufficiently conveys a definite warning as to the proscribed conduct, when measured by common understanding and commercial practice. *Roth* v. *United States*, 354 U.S. 476, rehearing denied 355 U.S. 852 (1957).

The Ohio Securities Act makes its plain that a security must be sold through a licensed dealer unless the security or the transaction is exempt. The burden is upon the issuer to determine initially whether a sale or transaction is exempt. The exemption of promissory notes not offered directly or indirectly for sale to the public is not un-

constitutionally vague. *United States* v. *Crosby*, 294 F.2d 928, 952 (C.A. 2, 1961) cert. denied 368 U.S. 984. The statute clearly sets forth the conduct proscribed.

Appellant further claims that the prosecutor's comment on the Appellant's failure to take the witness stand in his defense violated his constitutional right to due process.

In *Tehan* v. *Shott*, 382 U.S. 406 (1966), the Supreme Court held the doctrine of *Griffin* v. *California, supra*, would not be applied retrospectively. In *Griffin*, the Supreme Court held that adverse comment on a defendant's failure to testify in a state criminal trial violated the privilege against self-incrimination. We find no basis to the alternative argument now presented that the prosecuting attorney's summation amounted to unfair testimony such as to violate due process.

The judgment of the District Court is affirmed.

APPENDIX B

The Statute Involved

Ohio Securities Act, Ohio Rev. Code, Sections 1707.01-1707.45

Section 1707.02 Exempt securities. (GC Section 8624-3)

* * *

(G) Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public. * * *

Section 1707.44 Violations. (GC Section 8624-25)

(A) No person shall engage in the business of acting as broker for others in the purchase or sale of securities, sell securities, cause them to be sold, offer them for sale, cause them to be offered for sale, or engage in the business of buying, selling, or dealing in securities otherwise than in transactions through or with a licensed dealer, unless the securities are of a kind specified in division (G) or (I) of section 1707.02 of the Revised Code, the transactions are of a kind specified in divisions (B) to (L), inclusive, and (P) to (R), inclusive, of section 1707.03 of the Revised Code, or in section 1707.04 or 1707.06 of the Revised Code, or the transactions are exempt under section 1707.34 of the Revised Code, without being licensed by the division of securities.

* * *

(C) No person shall knowingly and intentionally sell, cause to be sold, offer for sale, or cause to be offered for sale, any security which comes under any of the following descriptions:

(1) Is not exempt under section 1707.02 of the Revised Code, nor the subject matter of one of the transactions exempted in sections 1707.03, 1707.04, and 1707.34 of the

Revised Code, has not been registered by description or qualified, and is not the subject matter of a transaction that has been registered by description; * * *

Section 1707.45 Burden of proof. (GC Section 8624-25)

In any indictment, complaint, or information under section 1707.44 of the Revised Code, it shall not be necessary to negative the existence of facts which would bring a security within section 1707.02 or 1707.05 of the Revised Code, or would bring a transaction within section 1707.03, 1707.04, or 1707.06 of the Revised Code or to negative existence of facts which would bring a transaction within the exceptions of sections 1707.33 and 1707.34 of the Revised Code. The burden of proof shall be upon the party claiming the benefits of any of such sections.

BLANK

PAGE